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In the Supreme Court of the United States

DAVID KING, ET AL.,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Brief of Missouri Liberty Project and Missouri Forward Foundation as Amici Curiae in Support of Petitioners

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INTEREST OF AMICI CURIAE

Founded by constitutional lawyers and law professors Joshua Hawley and Erin Morrow Hawley, Missouri Liberty Project and Missouri Forward Foundation are nonprofit organizations dedicated to promoting constitutional liberty and limited government. As part of their mission, the Project and Foundation seek to give everyday Missourians a meaningful voice in government. Following adoption of the Patient Protection and Affordable Care Act, Missouri citizens elected by statewide ballot to prohibit establishment of a state-based exchange under the Act. The IRS rule at issue here, however, effectively deems Missourians to have done just the opposite. As a voice for Missourians, the Project and Foundation have an important interest in seeing that the deliberative choices of Missouri citizens are not overridden by a federal regulation that exceeds the Executive branch's statutory authority.[1]

SUMMARY OF ARGUMENT

As every court to have ruled on the issue has observed, the Patient Protection and Affordable Care Act does not clearly authorize the IRS rule upon which this litigation turns. That apparent mismatch between statutory authority and interpretive rule

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[1] Pursuant to Supreme Court Rule 37.6, the Project and Foundation certify that this brief was not authored in whole or in part by counsel for any party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the Project, the Foundation, or their counsel. Pursuant to Rule 37.2(a), counsel for the parties received timely notice of intent to file this brief, and written consents from all parties to the filing of this brief have been filed with the Clerk.

has produced lawsuits in four different circuits, with perhaps more to follow. Meanwhile, the panels for the two courts of appeals that have reached a final judgment came to opposite conclusions. The result is profound uncertainty about the availability of federal insurance subsidies, the operation of the state and federal health-insurance exchanges, and the Act itself.

This uncertainty requires this Court's intervention. There is no value to further percolation. The status of the IRS rule cannot be decisively resolved except by this Court, unless the Court is prepared to wait for every circuit to have its say. Even then, the Court's intervention may still be required in the event of a circuit split, and, in the meantime, the costs of delay for individuals, for employers, and for States are nothing short of enormous.

The issues in the litigation are fully developed. This case is an appropriate vehicle for resolving them: the suit presents the relevant questions squarely and without procedural defects. In the interests of the many parties burdened by the confused state of the law, the Court should grant certiorari and resolve this pressing question now.

ARGUMENT

The Patient Protection and Affordable Care Act authorizes a tax credit to reduce the cost of insurance purchased "through an Exchange established *by the State*." 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A) (emphasis added).

Two years after Congress adopted the Act, the IRS issued regulations authorizing tax credits for use on exchanges established by the *federal govern-*

ment, not the States. 77 Fed. Reg. 30,377, 30,378, 30,387 (May 23, 2012); 45 C.F.R. § 155.20 (defining "Exchange" to include any Exchange, "regardless of whether the Exchange is established and operated by a State... or by HHS").

The mismatch between the IRS rule and the plain language of the Act has led to nationwide uncertainty. Challenges to the rule have already been brought in four circuits, and other challenges may be filed. As courts have acknowledged, the fit between the regulation and the authorizing text of the Act presents questions with "major ramifications." *Halbig v. Burwell*, No. 14-5018, 2014 WL 3579745, at *3 (D.C. Cir. July 22, 2014). And the two circuit panels to have reached a judgment have come to opposite conclusions, with the Fourth Circuit upholding the IRS rule and the D.C. Circuit striking it down. To put it mildly, the validity of the IRS rule is the subject of some doubt.

The cost of this doubt is significant. The rule has tremendous implications for individuals, employers, and States. The Affordable Care Act ties both the individual mandate and the employer mandate to the availability of premium assistance. To be specific: If premium assistance is unavailable, those mandates cease to operate as to millions of individuals and numerous employers.[2] And some 34 States have elected not to establish an exchange. Pet. App. 7a.

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[2] *See Halbig v. Burwell*, No. 14-5018, 2014 WL 3579745, at *3 (noting millions of affected individuals); Juliet Eilperin & Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-Size Employers Until 2016*, Wash. Post, Feb. 10, 2014, http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-

The IRS rule making premium assistance available in those States anyway thus imposes significant legal obligations on individuals and employers—including penalties in the form of taxes for noncompliance—that they would otherwise not bear. And it eliminates state officials' ability to decide whether they and their citizens will participate in the Act's system of cooperative federalism, thus undermining the democratic process in the States. These burdens are significant, and there is no real prospect that they will disappear without this Court's review.

In short, this case involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c) (identifying criteria for certiorari); *see also Gonzales v. Raich*, 545 U.S. 1, 9 (2004) ("The obvious importance of the case prompted our grant of certiorari.").

I. There Is No Value To Further Percolation: Multiple Challenges To The IRS Rule Are Pending, Others May Be Filed, And The Uncertainty About The Rule's Status Will Continue Absent This Court's Review.

The status of the IRS interpretive rule making subsidies available on exchanges established by the federal government is in serious doubt. As even the court below acknowledged, the fit between the regulation and the authorizing text of the Act presents "difficult" questions. Pet. App. 22a. The regulation is the subject of multiple suits brought in four separate circuits. Two circuit panels have already reached a

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until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html (noting that the employer mandate affects the employers of 72% of all Americans).

judgment, coming to opposite conclusions. Further litigation awaits.

Given these facts, there is no value to additional percolation. The legal issue will not go away. Indeed, these cases may well proliferate. Unless this Court is prepared to wait for every relevant circuit to render judgment, there is virtually no chance that this pressing national question can be resolved absent the Court's intervention.

1. The uncertainty generated by the IRS rule and subsequent litigation cannot be resolved by any one circuit. Some 34 States have declined to establish exchanges pursuant to the Act. Pet. App. 7a. These States fall within ten different circuits.[3]

Some of these States and their citizens have already brought suit, and many more may do so. Consider: All of the 34 States that have opted not to establish a healthcare exchange qualify as large employers under the Act. The IRS rule making subsidies available despite the absence of state-established exchanges thus subjects these States to the strictures and assessments of the employer mandate. That is a burden that caused Indiana and Oklahoma to file suit. *See* Entry on Motion to Dismiss at 8-9, *Indiana v. IRS*, No. 1:13-cv-01612 (S.D. Ind. Aug. 12, 2014), ECF No. 77, 2014 WL 3928455

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[3] Kaiser Family Found., *State Decisions on Health Insurance Marketplaces and the Medicaid Expansion*, June 10, 2014, http://kff.org/health-reform/state-indicator/state-decisions-for-creating-health-insurance-exchanges-and-expanding-medicaid/ (listing the 34 States); 77 Fed. Reg. 18,310, 18,311-12, 18,326-27 (Mar. 27, 2012) (noting that "partnership exchanges" provide opportunities for state input but are established by the federal government under section 1321 of the Act).

(recognizing Indiana's standing to sue); Order at 16-19, *Oklahoma* ex rel. *Pruitt v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. Aug. 12, 2013), ECF No. 71, 2013 WL 4052610 (recognizing Oklahoma's standing to sue). There is no reason to think that, so long as the question remains unanswered by this Court, other States in other circuits would not do the same. *See, e.g.*, Statement, Bobby Jindal, Governor, Louisiana, July 22, 2014, http://gov.louisiana.gov/index.cfm?md=newsroom&tmp=detail&articleID=4622 (criticizing the IRS rule); Statement, Phil Bryant, Governor, Mississippi, July 22, 2014, http://www.governorbryant.com/governor-bryant-comments-on-halbig-v-burwell-obamacare-ruling/ (same).

Then too, every such non-electing State almost certainly has citizens like the plaintiffs here, who do not want or cannot afford the health insurance mandated by the Act, even if partially subsidized. The IRS rule forces these citizens to pay for the mandated insurance or to face a tax penalty. Pet. App. 10a-12a (recognizing these plaintiffs' standing to sue). This burden would not exist absent the IRS rule. These citizens too have powerful incentives to bring future suits.

2. This case is the only vehicle available for deciding this pressing question now. The D.C. Circuit is still considering the government's petition for rehearing en banc; if granted, it could take that court many months to issue its decision. And there is no guarantee that the government would petition for certiorari after a loss in the D.C. Circuit, as the District of Columbia has implemented its own exchange. If the Fourth Circuit's decision stands, the government may well prefer to litigate the issue in other

circuits in an effort to limit the effect of the D.C. Circuit's ruling and delay a nationwide determination.

Two other suits, one brought by Oklahoma, the other by Indiana, are pending in district court. But these cases will not be available for this Court's review for some time, certainly not this Term. In Oklahoma's lawsuit, a motion for summary judgment has been pending in the district court for over six months. *See* Motion for Summary Judgment, *Oklahoma* ex rel. *Pruitt v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. Feb. 18, 2014), ECF No. 87. Even if the district court ruled immediately, and even if the Tenth Circuit granted expedited review, the case would still take months to resolve. That means any petition for a writ of certiorari could be filed no earlier than spring 2015, too late for consideration this Term.

Indiana's suit is no further along. The district court in that case only recently denied the government's motion to dismiss. Entry on Motion to Dismiss, *Indiana v. IRS*, No. 1:13-cv-01612 (S.D. Ind. Aug. 12, 2014), ECF No. 77, 2014 WL 3928455. And the parties' competing motions for summary judgment will not be argued to the district court until October. *Id.* at 23. Even if the district court issued a final decision on the day of oral argument, and even if the Seventh Circuit expedited its review, that case also would almost certainly not arrive for this Court's consideration during this Term.

This case is the only current vehicle for resolving this pressing question. The question is squarely and ably presented and no procedural hurdle exists to prevent this Court's review. Delay will yield no clarity. The Court should resolve the question now.

II. The Costs Of Delay Are Significant. Individuals, Employers, And States Need A Final Decision Urgently.

The mismatch between the IRS rule and the Act's plain language creates confusion that significantly burdens individuals, employers, and States. Delay would only worsen that burden. For this reason too, the Court should grant certiorari now.

A. Individuals need clarity so they can make important health-insurance decisions.

Individuals need to know as soon as possible whether the IRS rule is valid, so they can manage their health-insurance decisions and avoid incurring substantial taxes and liabilities.

The Act's mandate that individuals purchase health insurance is tied to the availability of federal subsidies. Pet. App. 8a-9a. Consequently, if the IRS rule is valid and the federal government may offer subsidies even in States that have not established an exchange, many citizens in those States will now be forced to either buy insurance that they did not previously have or pay a tax penalty. Pet. App. 8a.

This duty is expensive. The Act requires individuals to spend up to eight percent of their income on insurance to avoid the tax penalty. 26 U.S.C. § 5000A(e)(1)(A)-(B). And, of course, the longer it takes for a final adjudication of the issue, the more government money will be spent on complying with a rule that may or may not be authorized. *See* Cong. Budget Office, *The Budget and Economic Outlook: 2014 to 2024*, at 109 tbl. B–3 (2014) (estimating IRS outlays on premium credits at billions of dollars a

month). Neither the billions of dollars spent by individuals in the non-electing 34 States to comply with the Act nor those monies expended by the federal government in providing insurance subsidies will ever be recouped.[4]

On the other hand, if the IRS rule is a valid interpretation of the Act, consumers in the 34 States without their own exchanges are entitled to premium assistance. But given the current, confused state of the law, individuals living in those States may fail to claim the subsidies or purchase insurance at all, fearing that the subsidies may not be available in the long term. *See, e.g.*, Anna Wilde Matthews et al., *Hospitals, Insurers Say Subsidies Rulings Further Confuse the Issue*, Wall St. J., July 22, 2014, http://online.wsj.com/articles/hospitals-insurers-say-subsidies-rulings-further-confuse-the-issue-1406066874 (noting uncertainty among consumers about the Act's operation); Robert Pear, *New Questions on Health Law as Rulings on Subsidies Differ*, N.Y. Times, July 23, 2014, at A1 (noting that at least two cases on this issue are pending in district court and that different rulings may inject uncertainty and confusion into health-insurance markets).

In short, Americans living in the 34 States without state-established exchanges do not currently know whether they are free to buy the type of insurance they personally desire or whether they must

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[4] 26 U.S.C. § 36B(f)(2) creates a recapture tax for premium assistance that is paid by the IRS but not authorized by the Act, but that recapture tax is capped tightly. 26 U.S.C. § 36B(f)(2)(B)(i). Moreover, it is significantly unclear whether the Secretary of the Treasury would elect not to pursue a recapture of tax credits claimed in reliance on the IRS rule.

buy the type of insurance specified by the Act (or pay a tax penalty instead). *See, e.g.*, Jeff Falk, *Survey: Many Texans Eligible for Subsidies from Affordable Care Act's Health Insurance Marketplace Still Believe Coverage Is Too Expensive*, July 8, 2014, http://news.rice.edu/2014/07/08/survey-many-texans-eligible-for-subsidies-from-affordable-care-acts-health-insurance-marketplace-still-believe-coverage-is-too-expensive (discussing Rice University survey noting that many individuals did not sign up for health insurance through the federally-established exchange for Texas because, even with subsidies, the cost was too high); Diane Snyder, *I Never Thought I'd Be an Outlaw, but the Affordable Care Act Might Make Me One*, The Guardian, Dec. 20, 2013, http://www.theguardian.com/commentisfree/2013/dec/20/affordable-care-act-healthcare-not-affordable (explaining how healthcare is less affordable for the author under the Act). By the same token, these citizens do not know if insurance subsidies are truly and legally available to them or not.

These individuals need and deserve a prompt resolution of these questions. The Fourth and D.C. Circuits implicitly recognized that need by accelerating their review of the issue. *See* Order, *King v. Sebelius*, No. 14-1158 (4th Cir. Feb. 24, 2014); Order, *Halbig v. Sebelius*, No. 14-5018 (D.C. Cir. Jan. 23, 2014). Since then, the need has only grown more pressing, and the state of the law more confused. This Court should resolve this question now.

B. Employers need to know because the IRS rule affects imminent staffing and budgeting decisions.

The validity of the IRS rule is also of tremendous importance to numerous employers in the 34 non-electing States. Any company that employs 50 or more people will be potentially subject to sizable penalties—as early as January 1, 2015 for some—if they do not sponsor certain types of insurance. 26 U.S.C. § 4980H(b), (c)(2)(A). But this so-called "employer mandate" will take effect only if and where federal premium assistance is available. If the premium-assistance credit is not available because the State has elected not to establish an exchange, then there is no employer mandate. 26 U.S.C. § 4980H(a).

Employers in those 34 States need to know as soon as possible whether the employer mandate will apply to them. The mandate directly affects imminent and important employment decisions. For example, employers may be forced to fire employees, cut hours, eliminate expansion plans, or even close shop in order to comply with the mandate as well as the Act's associated administrative requirements. These burdens facing employers have been thoroughly reported. *See, e.g.*, Sandhya Somashekhar, *As Health-care Law's Employer Mandate Nears, Firms Cut Worker Hours, Struggle with Logistics*, Wash. Post, June 23, 2014, http://www.washingtonpost.com/national/health-science/as-health-care-laws-employer-mandate-nears-firms-cut-worker-hours-struggle-with-logistics/2014/06/23/720e197c-f249-11e3-914c-1fbd0614e2d4_story.html (noting that the employer mandate goes into effect in January 2015 for many companies and is having the effect of limiting expansion

plans, adding administrative costs, and reducing employee hours); Pear, *supra* (discussing a carpet store that will be put out of business if it must start subsidizing insurance under the mandate); Lisa Myers & Carroll Ann Mears, *Businesses Claim Obamacare Has Forced Them to Cut Employee Hours*, NBCNews.com, Aug. 13, 2013, http://www.nbcnews.com/news/other/businesses-claim-obamacare-has-forced-them-cut-employee-hours-f6C10911846 ("Employers around the country, from fast-food franchises to colleges, have told NBC News that they will be cutting workers' hours below 30 a week because they can't afford to offer the health insurance mandated by the Affordable Care Act....").

None of those hard decisions may be necessary in over two-thirds of the States if the IRS rule is not authorized by the Act. But until that question is resolved, many employers simply do not know how to staff, budget, and generally run their businesses. Many of the belt-tightening decisions currently being made, moreover, cannot be easily undone. Employees who are fired in anticipation of the employer mandate, for example, are unlikely to be rehired if the IRS rule ultimately is held invalid. This critical uncertainty can be settled only by this Court's review.

C. States need a decision so the Act's federalism provisions can work, and because they are large employers.

The uncertainty over the IRS rule's validity also affects the States, in two different ways. First, it affects them in their capacity as sovereign governments. Second, it affects them as large employers.

The plain language of the Act follows in the tradition of what is sometimes called cooperative federalism: using the promise of federal expenditures (subsidies to citizens and grants to States) to encourage States to cooperate with the federal government within their traditional areas of authority (such as regulating health insurance). Other provisions of the Act follow that same structure. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (discussing Medicaid provisions). So do numerous other federal laws.[5]

The federalism provisions at issue here cannot work unless and until the Act is clarified. The IRS rule purports to render state citizens' decision whether to establish a healthcare exchange more or less irrelevant. The current confusion on the rule's status makes it extremely difficult for state citizens to weigh the costs and benefits of establishing an exchange, and equally difficult to hold state elected of-

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[5] *See, e.g.*, Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8 (codified in part at 42 U.S.C. §§ 1397aa-1397ff) (requiring States to submit plans and meet requirements to receive federal funding for services to children); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in part at 20 U.S.C. § 6311) (setting out administrative and educational requirements for States to receive grants from the federal government); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in part at 42 U.S.C. §§ 601-608) (conditioning federal support for cash payments to needy families on States' requiring recipients to meet work and other requirements); Federal Unemployment Tax Act (codified at 26 U.S.C. §§ 3301-3311) (conditioning the receipt of private tax subsidies within a State on the State's compliance with federal standards for unemployment compensation).

ficials accountable for following citizens' wishes in this regard. Indeed, the IRS rule as written imposes on state citizens and employers the burdens of a state-established exchange, but breaks the accountability between state government and state citizens for that important decision. The effect is to diminish the political authority of state voters and short-circuit the democratic process in the States. This result is particularly troubling in light of the plain language of the Act, which appears to give state citizens the right to make precisely the political choices the IRS's interpretive rule overrides.

The anti-democratic effect of the present state of the law is particularly visible in Missouri, where voters passed a statewide referendum denying the governor and state agencies the power to establish an exchange under the Act, absent further legislation or statewide referendum. S. 464, 96th Gen. Assemb., 2d Reg. Sess., 2012 Mo. Legis. Serv. 85 (West) (codified as amended at Mo. Rev. Stat. § 376.1186), *available at* http://www.senate.mo.gov/12info/pdf-bill/tat/SB464.pdf. But the IRS rule, by treating the federal government as acting for the state in establishing an exchange, overwrites Missourians' expressed desire that they and their representatives judge the costs and benefits of state participation in the exchange program. And it leaves Missouri citizens, whose voices have now been effectively silenced, without recourse.

States have another urgent need for a final decision on the IRS rule's validity: they are large employers and, like their counterparts in the private sector, potentially liable for sizable penalties if they do not sponsor specified types of insurance for their

employees. Once again, this so-called "employer mandate" will take effect only *if and where federal premium assistance is available*. Courts have therefore recognized the States' standing to challenge the IRS rule. Entry on Motion to Dismiss at 4-5, 8-9, *Indiana v. IRS*, No. 1:13-cv-01612 (S.D. Ind. Aug. 12, 2014), ECF No. 77, 2014 WL 3928455 (recognizing Indiana's standing to sue because it has employees who work enough hours per week to be classified as full-time under the Act, but not enough to be entitled to health insurance under Indiana personnel policies regarding full-time status); Order at 16-19, *Oklahoma* ex rel. *Pruitt v. Burwell*, No. 6:11-cv-00030 (E.D. Okla. Aug. 12, 2013), ECF No. 71, 2013 WL 4052610 (recognizing Oklahoma's standing to sue as an employer likewise affected by the IRS rule). Many of the other 34 sovereign States who have elected not to establish exchanges will likely face similar burdens. Respect for those States and their citizens—ensuring that they are not subject to burdens and assessments not authorized by Congress—also counsels strongly in favor of granting review now.

* * * * *

The uncertainty over the IRS rule is pervasive, deep, and—for millions of individuals, for employers, and for States—profoundly burdensome. This uncertainty cannot be finally resolved without the involvement of this Court. This is a question of the utmost national importance, and this case is an appropriate vehicle for addressing it. This Court should decide the question now.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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